83 - 1658

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES F. McMANUS,

Petitioner,

vs.

THE VILLAGE OF SOUTHAMPTON, NEW YORK, THE TOWN OF SOUTHAMPTON, NEW YORK, DONALD FANNING and JAMES CHISM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES F. McMANUS, ESQ.
Attorney for Petitioner - Pro Se
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April 10, 1984

QUESTION PRESENTED FOR REVIEW

1. Should the Eastern District of New York have dismissed the complaint (Appendix E) as to the Village of Southhampton New York and the Town of Southhampton New York.

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IN THE

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OCTOBER TERM, 1983

JAMES F. McMANUS,

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– against –

THE VILLAGE OF SOUTHAMPTON, NEW YORK, THE TOWN OF SOUTHAMPTON, NEW YORK, DONALD FANNING and JAMES CHISM,

Respondents.

PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner James F. McManus petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit dated and entered January 13, 1984 (Docket No. 83-7590). The judgment affirmed judgements of the Eastern District of New York (Pratt J.) dismissing a complaint in so far as the Village of Southhampton, New York and the Town of Southhampton New York were concerned.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28USC Section 1254(1).

STATUTES INVOLVED

Statutes Involved 42 U.S.C. Sections 1983, 1988 and the **Fourth**, Fifth, Sixth and **Fourteenth** amendments of the U.S. Constitution and 28 U.S.C. Sections 1331, 1332, 1343(1)(2)(3) and (4) and pendent jurisdiction to consider claims arising under State Law.

STATEMENT OF THE CASE

This is a proceeding to reverse a judgment (Appendix A) of the U.S. Court of Appeals for the Second Circuit wherein it affirmed two orders of the U.S. Eastern District of New York (Pratt J.) the first of which granted a motion to dismiss the complaint against the Town of Southampton New York (Appendix D) and the second of which granted one part of a similar motion to dismiss the same complaint against the Village of Southampton New York (Appendix B) but denied that part of the motion which sought a dismissal against individual defendants James Chism and Donald Fanning.

The trial of the matter by a jury against the two (2) remaining individual defendants was held before a Magistrate and judgment was entered on behalf of your Petitioner as a plaintiff therein against the defendant Donald Fanning in the sum of Five Hundred ($500.00) Dollars and against your Petitioner as plaintiff therein, in favor of the defendant James Chism.

Your petitioners motion to vacate a stipulation so that the Court of Appeals could review everything was successfully opposed by the law firm simultaneously representing the defendants, The Village of Southampton New York, James Chism and Donald Fanning.

Your petitioner as plaintiff accordingly filed a Notice of Appeal whereby the Court of Appeals could review the final judgment dismissing as to the Town & Village and whereby the Eastern District Court may review the judgments as they pertain to the defendants Chism and Fanning in the event that your petitioner does not prevail herein.

Nevertheless shortly before the Circuit Court of Appeals heard the matter the individual defendant James Chism through a firm of attorneys which specializes in "P.B.A." matters served a Five Million ($5,000,000.00) Dollar suit for "malicious prosecution" and "slander" in a New York State Supreme Court matter. Your petitioner has duly served an answer therein, with affirmative defenses referring to the aforesaid appeals.

REASON FOR GRANTING WRIT

It is respectfully submitted that Judge Pratt's actions as affirmed by the Second Circuit departed so far from the accepted course of judicial proceedings in dismissing the complaint at the pleadings stage that same calls for an exercise of this Court's power of supervision. It is further respectfully submitted that no less than the Chief Judge of the State of New York in an address "Waste Not-Wait Not-a Consideration of Federal and State Jurisdiction" was caustic about the Second Circuit's attitudes on "1983" suits. Such is reported in 49 Fordham LR 895,901 where at page 901 thereof there is a further reference to 12 Creighton L. R. Rev 1, 23-24 (1978)

ARGUMENT

I. The U.S. Court of Appeals for the Second Circuit in quoting *Battista v. Rodriguez*, 702 F 2d 393 would have one overlook the following at page 397 thereof

> A plaintiff, suing under Section 1983 while obligated to make "a short and plain statement" of the essential elements of his claim in his complaint, Fed. R. Civ P 8(a) is not required to see out the facts is detail. The complaint will survive dismissal "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief" *Corley v. Gibson*, 355 U.S. IV; 45-46 etc.

It is also submitted that while *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978) as relied upon by the U.S. Court of Appeals for the Second Circuit has begun to admit that a municipality may be sued under section 1983 other cases such as *Owen v. City of Independence Missouri*, 445 U.S. 622 have recognized that the scope of 42 U.S.C. 1983 should not have been so restricted by judicial interpretation as it has been. Indeed I respectfully submit that the dissent in *Aldinger v. Howard*, 427 U.S. 1, 19 should be reviewed together with its references to Congressional records by the Court in connection with this matter in view of all the later recognition of the responsibilities and liabilities of municipalities in cases decided since Monell.

The "demonstrably untenable" result or conclusion reached in *Aldinger v. Howard* at page 19 thereof to the effect that Congress has by implication declined to extend federal jurisdiction over a party such as a county has surely been demonstrably negated by this court's recognition that a municipality *is* a "person" in such cases as *Owen v. City of Independence Missouri*, 446 U.S. 622.

It is noted that your Petitioner herein framed his complaint using a good example supplied him at a seminar of the Suffolk Academy of Law of the Suffolk County Bar Association on May 16, 1981!

Surely if the people of a political subdivision should elect or select a person as sheriff or police officer who was a bully, a bigot, a racist, a drunkard and/or an idiot, the same people would be liable for his or her misdeeds in warrantless "ignomious" arrests of other people. A plaintiff should not be obliged to plead such nor should he be obliged to plead that a town or a village while having the obligation to do so, failed to properly screen and instruct a person before dubbing him or her with arrest powers. Your petitioner respectfully insists that the complaint herein should have in no wise been dismissed as against the Town and Village at the pleading stage. It is noted that Judge Pratt orders dismissing the complaint as against such municipal defendants negated my "Requests for Production of Documents" whereby I could conduct proper measures before trial to proceed to demonstrate to a jury's satisfaction, subject to a proper charge, the amounts that it could assess against each of the respective defendants for punitive and compensatory damages relative to:

1. unconstitutional arrest
2. negligence
3. malicious prosecution

I submit that the U.S. Court of Appeals further erred where it would hold that the pendent jurisdiction claims were also dismissed within Judge Pratt's discretion. The separate firms of attorneys for the Town and Village employed by the Insurance Company of North America did not contend that it would have been an abuse of Judge Pratt's discretion for him not to have dismissed the claims arising only by virtue of state law such as the injuries to plaintiff's wrists. Indeed they could hardly have maintained such in view of the following from Judge Pratt's dismissal order: (Appendix B)

> "Defendants also contend that plaintiff should be required to elect to proceed against defendant Fanning in only one of his official capacities. Apparently, Fanning is both a town employee and a village employee. At this stage in the litigation it appears that

> the capacity in which Fanning was acting at the time of the incident leading to this lawsuit is an issue of fact that can only be determined at the trial of this action. Since defendant Fanning could have acted under color of state law for purposes of 42 U.S.C. 1983 in either of his official capacities, it is unnecessary and unfair to force plaintiff to elect to proceed against defendant in only one capacity."

After he had recognized that: "at oral argument in the motion, plaintiff explained that he does not intend to pursue a cause of action for assault or unconsittutional use of force, and that his complaint should be construed as setting forth causes of action for unconstitutional arrest, malicious prosecution and negligence in securing the handcuffs on plaintiff. Although plaintiff may not have set forth all of the technical elements of these causes of action, defendants are now on notice of precisely those claims that plaintiff intends to pursue."

Surely the Supreme Court will agree that Judge Pratt abused any discretion that could be claimed on his behalf when he dismissed the complaint against the employers of the defendants Chism and Fanning.

Judge Pratt's actions seriously prejudiced your petitioner when he left the jury in the dark as to where indemnification might come for the two (2) remaining defendants and precluded a fair trial.

It must be appreciated that the term "unconstitutional arrest" encompasses not only a person's "1983" and "1343(3)" claims but his rights to have realistic redress for "false arrest"-fundamental rights which go back to days prior to the adoption of the Federal and New York Constitutions and the enactment of such legislation as "1343(3)" and "1983".

"1983" should not be viewed as a judicial vehicle by which a person's rights in effect would be limited rather than enforced.

CONCLUSION

FOR THE FORGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT OF THE SECOND CIRCUIT SHOULD BE REVERSED SO THAT PETITIONER MAY HAVE A NEW TRIAL INVOLVING ALL FOUR DEFENDANTS.

Respectfully submitted,

JAMES F. MCMANUS
Attorney for Petitioner-Pro Se
1 Center Lane
Levittown, New York 11756
(516) 731-6400

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of January, one thousand nine hundred and eighty-four.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JAMES L. OAKES,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

----------X

JAMES F. McMANUS,

Plaintiff-Appellant,

– against –

THE VILLAGE OF SOUTHAMPTON, NEW YORK; THE TOWN OF SOUTHAMPTON, NEW YORK,

Defendants-Appellees,

DONALD FANNING and JAMES CHISM,

Defendants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

1. Appellant seeks to reverse so much of the judgment as dismisses his allegations against the Town of Southampton and the Village of Southampton. Judge Pratt correctly ordered the civil rights allegations, 42 U.S.C. §§ 1983, 1988, dismissed against the two municipalities. McManus's only basis for the complaints against the Town and Village is the employment status of the named defendants Donald Fanning and James Chism. The complaint does not allege that Fanning or Chism acted in furtherance of official policy or as part of a repeated practice in which municipal officials acquiesced. Accordingly, no cause of action against the Town or Village is stated in the complaint, and the allegations were properly dismissed. *See Battista* v. *Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983); *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 694 (1978).

2. The pendent jurisdiction claims against the Town and the Village were also properly dismissed within the trial judge's discretion, *see Nolan* v. *Meyer*, 520

F.2d 1276, 1280 (2d Cir.), *cert. denied*, 423 U.S. 1034 (1975). There is no independent federal subject matter jurisdiction over McManus's actions against the municipal defendants, since diversity does not exist and the civil rights allegations are insufficient as a matter of law to state a federal question. Pendent jurisdiction is not available in such a situation. *Aldinger* v. *Howard*, 427 U.S. 1, 17 (1976).

3. Appellant's other assertions are equally without merit.

4. Accordingly, the judgment is affirmed.

IRVING R. KAUFMAN,

JAMES L. OAKES,

RICHARD J. CARDAMONE,
Circuit Judges.

APPENDIX B

United States District Court Eastern District of New York
Memorandum and Opinion

----------X

JAMES F. McMANUS

Plaintiff,

– against –

THE VILLAGE OF SOUTHAMPTON, NEW YORK, THE TOWN OF SOUTHAMPTON, NEW YORK, DONALD FANNING and JAMES CHISM,

Defendants.

----------X

MEMORANDUM AND ORDER DOCKET NO. CV81-318

APPEARANCES:

JAMES F. McMANUS
Plaintiff Pro Se
One Center Lane
Levittown, New York 11756

MONTFORT, HEALY, McGUIRE & SALLEY
Attorneys for Defendants
163 Mineola Boulevard
Mineola, New York 11501

PRATT, J:

By motion returnable January 27, 1982 defendants move to dismiss the complaint because it does not contain "a short and plain statement of the claim[s] showing that the pleader is entitled to relief" in violation of FRCP 8(a), or, alternatively, for an order compelling plaintiff to file an amended complaint. In addition, defendant village moves to dismiss the complaint in its entirety because the allegations against it are legally insufficient as a matter of law. After considering the issues discussed in the papers and at oral argument on the motion, the court concludes that the village's motion to dismiss should be granted, but that it is unnecessary for the plaintiff to file an amended complaint setting forth his allegations and causes of action with particularity.

Plaintiff's complaint named both the Village and the Town of Southampton as parties defendants. The court has previously granted defendant town's motion to dismiss, and defendant village moves to dismiss for essentially the same reasons that required dismissal of the town. The only theory of liability upon which plaintiff has sued the defendant village is that of *respondeat superior*. Since plaintiff does not allege that the individual defendants were acting pursuant to any official policy or custom of the municipality at the time they arrested plaintiff, the village cannot be held liable for the actions of the individuals. *Monell v. Department of Social Services*, 436 US 658 (1978); *Turpin v. Mailet*, 619 F2d 196 (CA 2 1980). Under these circumstances, the complaint does not state a cause of action against the village and must be dismissed.

At oral argument on the motion, plaintiff explained that he does not intend to pursue a cause of action for assault or unconstitutional use of force, and that his complaint should be construed as setting forth causes of action for unconstitutional arrest, malicious prosecution, and negligence in securing the handcuffs on plaintiff. Although plaintiff may not have set forth all of the technical elements of these causes of action, defendants are now on notice of precisely those claims that plaintiff intends to pursue.

Defendants also contend that plaintiff should be required to elect to proceed against defendant Fanning in only one of his official capacities. Apparently, Fanning is both a town employee and a village employee. At this stage in the litigation, it appears that the capacity in which Fanning was acting at the time of the incident leading to this lawsuit is an issue of fact that can only be determined at the trial of this action. Since defendant Fanning could have acted under color of state law for purposes of 42 USC § 1983 in either of his official capacities, it is unnecessary and unfair to force plaintiff to elect to proceed against defendant in only one capacity. Accordingly, the court will not require plaintiff to file an amended pleading for this purpose.

At argument on the motion, the court also discussed with plaintiff and defense counsel the time necessary to complete pretrial proceedings. Plaintiff stated that most of his discovery was complete, and defense counsel requested four months in which to complete any necessary discovery. Defendants shall file a responsive pleading within twenty days and shall respond to plaintiff's request for the production of documents within thirty days. In addition, the following pretrial schedule is adopted:

May 31, 1982	All Discovery to be completed.
June 18, 1982	Plaintiff's proposed pretrial order to be submitted
July 2, 1982	Defendants' additional schedules for inclusion in the pretrial order to be submitted.
July 13, 1982 at 9:00 a.m.	Pretrial conference.
August, 1982	Term for trial.
July 30, 1982	Jury selection.

The village's motion to dismiss is granted; the motion to compel an amended statement of plaintiff's claims is denied. Included with this memorandum and order are the court's instructions for completion of the pretrial order.

SO ORDERED.

Dated: Uniondale, New York
February 4, 1982

s/
GEORGE C. PRATT
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
JUDGMENT

Judgment in a Civil Case

United States District Court
Eastern District of New York
Docket Number CV 81-3113
Case Title:

JAMES McMANUS

v.

THE VILLAGE OF SOUTHAMPTON ET AL

David F. Jordan, U.S. Magistrate

XXJury Verdict. This action came before the Court and ajury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

It is ordered and adjudged that judgment is hereby entered in favor of James F. McManus and against Donald Fanning in the sum of $500.00 with cost to James McManus; that judgment is entered in favor of James Chism and against James McManus, dismissing the complaint against James Chism with cost to James Chism; that judgment is entered in favor of the Town of Southampton and against James McManus, dismissing the complaint against the Town of Southampton with cost to the Town of Southampton, as per the order of the honorable George C. Pratt, United States Circuit Judge, having been filed on

December 21, 1981; and that judgment is entered in favor of the Village of Southampton and against James McManus, dismissing the complaint against the Village of Southampton with cost to the Village of Southampton, as per the memorandum and order of the honorable George C. Pratt, United States Circuit Judge, having been filed on February 8, 1983.

Clerk
Richard H. Weare

(By) Deputy Clerk
s/ April 5, 1983

APPENDIX D

U.S. DISTRICT COURT EASTERN DISTRICT OF NEW YORK DECISION
December 16, 1981

United States District Court
Eastern District of New York

----------X

JAMES F. McMANUS,

Plaintiff,

– and –

THE VILLAGE OF SOUTHAMPTON, NEW YORK, THE TOWN OF SOUTHAMPTON, NEW YORK, DONALD FANNING and JAMES CHISM,

Defendants.

----------X

NOTICE OF MOTION IS NOT REPRODUCED BECAUSE IT IS NOT PERTINENT.
THE JUDGE'S DECISION ON THE TOWN'S MOTION TO DISMISS THE COMPLAINT WAS ENDORSED ON THE FACE OF THE NOTICE OF MOTION ITSELF. IT READS AS FOLLOWS:

"MOTION GRANTED, ACTION DISMISSED AGAINST TOWN OF SOUTHAMPTON SO ORDERED."

GEORGE C. PRATT, U.S.D.J.
Uniondale, New York
12/16/81

APPENDIX E

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
COMPLAINT

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
CIVIL ACTION NO.
TRIAL BY JURY REQUESTED

JAMES F. McMANUS,

Plaintiff,

– against –

THE VILLAGE OF SOUTHAMPTON, NEW YORK;
THE TOWN OF SOUTHAMPTON, NEW YORK,
DONALD FANNING and JAMES CHISM,

Defendants.

Complaint for Damages

JAMES F. McMANUS
Attorney for Plaintiff
Office and P.O. Address
1 Center Lane
Levittown, New York 11756

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
CIVIL ACTION NO.
TRIAL BY JURY REQUESTED

JAMES F. McMANUS,

Plaintiff,

– against –

THE VILLAGE OF SOUTHAMPTON, NEW YORK; THE TOWN OF SOUTHAMPTON, NEW YORK, DONALD FANNING and JAMES CHISM,

Defendants.

Complaint for Damages

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF NEW YORK

Comes now JAMES F. McMANUS as plaintiff and as his Attorney Pro Se institutes this his cause of action against the above-named defendants, and pleads and prays as follows:

JURISDICTION

1. This is a Civil Action for damages brought pursuant to 42 U.S.C. Sections 1983 and 1988 and the Fourth, Fifth, Sixth and Fourteenth amendments of the United States Constitution. Jurisdiction is founded on 28 U.S.C. Sections 1331, 1332, 1343(1), (2), (3), (4), and the aforementioned statutory and Constitutional Provisions. Plaintiff further involves the pendent jurisdiction of this Court to consider claims arising under State Law.

2. The amount in controversy exceeds $10,000.00 excluding interest and costs.

PARTIES

3. Plaintiff, JAMES F. McMANUS, is a citizen of the United States and resident of the State of New York.

4. The defendant, TOWN OF SOUTHAMPTON, is a municipal corporation of the State of New York and at all times relevant hereto employed the defendant DONALD FANNING.

5. The defendant, VILLAGE OF SOUTHAMPTON, is a municipal corporation of the State of New York and at all times relevant hereto employed the defendants DONALD FANNING and JAMES CHISM.

6. The defendant, JAMES CHISM, is and at all times relevant hereto a police officer sergeant of the POLICE DEPARTMENT OF THE VILLAGE OF SOUTHAMPTON acting in such capacity as the agent, servant and employee of the defendant VILLAGE OF SOUTHAMPTON, New York. He is sued individually and in his official capacity.

7. The defendant, DONALD FANNING, is and at all times relevant hereto a police officer of the Town of Southampton, and a truck driver employee of the Village of Southampton acting in such capacities as the agent, servant and employee of the Town of Southampton and the Village of Southampton. He is sued individually and in his official capacities.

8. At all times relevant hereto, and in all their actions described herein, the individual defendants were acting under color of law and pursuant to their respective authority as police officers of the municipalities Village of Southampton and Town of Southampton.

FIRST COUNT

9. At 12:55 P.M. on July 2, 1980 the defendant DONALD FANNING acting in a triple capacity as a citizen, as an employee heavy truck driver of the Highway Department of the Village of Southampton and as a policy officer of the Town of Southampton (flashing Shield #209) having used the radio facilities of the Village of Southampton to summons them, requested the assistance of police of the Village of Southampton to arrest plaintiff. Disregarding the provisions of sub-section 4 of Section 140.40 of the Criminal Procedure Law of the State of New York the defendant JAMES CHISM ordered police officer Shield #5 of the Village of Southampton, after deliberation at a sidewalk conference or Kangaroo Court with the defendant DONALD FANNING and his Village Highway Department Foreman, to accompany aforesaid defendant DONALD FANNING and himself into the premises of the BUTTERY Restaurant on Wall Street, Southampton, New York where plaintiff was partaking of a lunch of an ordered "Reuben" sandwich and a glass of water in the company of his wife.

10. Whereupon the aforesaid defendant DONALD FANNING with deliberation, malice and without probable cause touched plaintiff muttering *he* was arresting plaintiff for "harassment." That plaintiff asked the said defendant JAMES CHISM if he could finish his lunch and the defendant JAMES CHISM said "NO"! Whereupon the aforesaid Village police officer Shield #5 at the direction of the defendant JAMES CHISM ordered plaintiff to put his hands behind his back, abruptly clamped handcuffs on plaintiff's wrists and in doing so caused pain, abrasions and contusions.

11. Whereupon said Village police officer ordered him into the caged rear seat thereof with his hurting handcuffed wrists under and behind him causing additional pain, upset, contusions, abrasions, unnecessary and undue stress and a rise in blood pressure.

12. That when plaintiff complained of the pain to the defendant JAMES CHISM the defendant JAMES CHISM retorted

that "your wrists are very big, and if you threaten to sue for false arrest *I'll* make an additional charge of "harassment".

13. That plaintiff requested that he be brought promptly before a magistrate whereupon he was advised that he had to be taken to the Village Police Station although an appropriate local criminal court was then and there available and functioning.

14. At the Village Police Station plaintiff was unlawfully detained and unduly delayed by "paper work" including the preparation of a uniform traffic ticket of the "SOUTHAMPTON VILLAGE POLICE DEPT." which was then and there signed and served upon him by the defendant DONALD FANNING.

15. The defendant JAMES CHISM then refused to issue an appearance ticket on the "harassment" charge saying "you requested to be brought before a magistrate" and refused to let plaintiff speak to his superiors claiming he was in "FULL CHARGE".

16. Whereupon after further calculated undue delay and imprisonment where plaintiff's wife was not allowed to visit or consult with plaintiff, plaintiff was again handcuffed, put in the rear caged seat of a Village police car and driven through the streets of Southampton to the Town Court of the Town of Southampton.

17. Plaintiff then and there observed the defendant DONALD FANNING swearing to a purported information, and plaintiff was given a blurred copy of same!

18. That on the 2nd day of July 1980 the defendant JAMES CHISM, when he assisted in the arrest of the plaintiff as a charge pursuant to Section 240:25 Subd. 3 of the New York State Penal Law, had been a police officer for defendant VILLAGE OF SOUTHAMPTON for same thirteen (13) years, was familiar with Main Street in the Village of Southampton for same thirteen (13) years knew that the distance from Hampton Road to Wall Street on Main Street was only some six hundred (600) feet and that southbound traffic on Main Street at all times relevant hereto was "bumper to bumper".

19. That on the 2nd day of July 1980 the defendant DONALD FANNING, when he charged plaintiff with violation of Section 240.25 Subd. 3 of the New York State Penal Law had been a resident of the Village of Southampton for some forty nine (49) years, had on information and belief been born on Hampton Road in the Village of Southampton (as had his father), the said DONALD FANNING knew the distance from Hampton Road on Main Street to Wall Street in the Village of Southampton was only some six hundred (600) feet and knew that southbound traffic on aforesaid Main Street was at all times relevant hereto "bumper to bumper".

20. That upon all further Court appearances except for his appearance on February 11, 1981 the defendant DONALD FANNING wore the uniform of a police officer of the Town of Southampton.

21. Plaintiff was required to attend numerous Court proceedings, a trial that began on February 4, 1981 was not concluded until February 11, 1981 at which time claimant was cleared and acquitted of such charge brought pursuant to Section 240:25 Subd. 3 of the Penal Law of the State of New York.

22. That at all times prior to and during the criminal proceedings commenced by the defendants against plaintiff they knew or should have known that plaintiff was innocent of any wrongdoing.

23. The acts of the defendants above described were committed under color of law, and under color of their authority as police officers of the Village of Southampton and the Town of Southampton, deprived plaintiff of rights, remedies, privileges and immunities guaranteed to each citizen of the United States, in violation of 42 U.S.C. Sections 1983 and 1988 and deprived plaintiff of rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments of the Constitution of the United States.

24. Each of the defendants, individually and in concert with the others, acted under pretense and color of law, and in their

respective official capacity, but said acts were beyond the scope of their jurisdiction and without authorization of law and in the abuse of their power, and each defendant acted wilfully, knowingly and with the specific intent to deprive plaintiff of his constitutional rights secured to plaintiff by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and by Title 42 U.S.C. Section 1983.

25. Plaintiff alleges that in doing the acts herein above complained of, the defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny plaintiff of rights guaranteed to him under the Constitution and Laws of the United States, particularly those hereinabove enumerated.

26. Plaintiff alleges that as a direct consequence and result of the acts of defendants hereinabove complained of, plaintiff suffered severe psychological and social injuries, great humiliation in the community which caused serious disruption to plaintiff's social and family life; requiring plaintiff and his family to expend sums of money as and for medical treatment; and miscellaneous expenses in defending against the various charges in the sum of $3,000.00

SECOND COUNT

27. The allegations in paragraphs 1 through 16 are incorporated by reference herein as if fully set forth.

28. On July 31, 1981 in duplicate pursuant to Section 50 (e) of the General Municipal Law of the State of New York, written notices of claim were duly served upon clerks of the defendants VILLAGE OF SOUTHAMPTON and TOWN OF SOUTHAMPTON in order to comply with the New York Statute. The said defendants VILLAGE OF SOUTHAMPTON and TOWN OF SOUTHAMPTON have examined plaintiff but have failed and refused to pay plaintiff anything on his claim for damages arising from the injuries to his wrists, emergency room services at Brookhaven Memorial Hospital and further failed and refused to pay plaintiff anything for his claim for conscious pain and suffering, upset, undue stress, discomfort and rise in blood pressure.

29. That said acts of the defendants described herein against plaintiff were negligent under the laws of the State of New York for which plaintiff is entitled to recover damages against the defendants.

THIRD COUNT

30. The allegations in paragraph 1 through 26 are incorporated by reference herein as if fully set forth.

31. On May 6, 1981 in duplicated pursuant to Section 50 (e) of the General Municipal Law of the State of New York, written notice of claim were duly served upon the clerks of the Village of Southampton and the Town of Southampton in order to comply with the New York Statute. The said defendants VILLAGE OF SOUTHAMPTON and TOWN OF SOUTHAMPTON have examined plaintiff thereon but have failed and refused to pay plaintiff anything for his claim with respect to malicious prosecution.

32. The said acts of the defendants herein against the plaintiff constitute the tart of malicious prosecution under the laws of the State of New York for which plaintiff is entitled to recover damages against the defendants.

WHEREFORE, plaintiff demands the following relief, jointly and separately against all of the defendants:

1. Compensatory damages for plaintiff in the amount of $2,500,000.00;

2. Punitive damages for plaintiff in the amount of $2,500,000.00;

3. For reasonable attorney fees pursuant 42 USC 1988 together with all court costs and disbursements;

4. Such other and further relief as this court may deem appropriate and which is necessary and just under the circumstances.

JAMES F. MCMANUS, ESQ.
Attorney for Plaintiff
1 Center Lane
Levittown, New York 11756
(516) 731-6400

Dated: September 23, 1981
Levittown, N.Y.

STATE OF NEW YORK)
): ss.:
COUNTY OF NASSAU)

JAMES F. McMANUS, being duly sworn, deposes and says: That he is the Plaintiff herein; That he has read the foregoing Complaint, knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Sworn to before me this: 23rd day of September, 1981.

JAMES F. McMANUS

Notary Public
Harold M. Davis
Notary Public, State of New York
No. 30-0875525
Qualified in Nassau County
Commission Expires March 30, 1983

NO. 83-1658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES F. McMANUS,

Petitioner,

—against—

THE VILLAGE OF SOUTHAMPTON, NEW YORK, and THE TOWN OF SOUTHAMPTON, NEW YORK,

Respondents,

DONALD FANNING and JAMES CHISM,

Defendants.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Statement of Facts

The Petitioner commenced this proceeding in the District Court for the Eastern District of New York contending that jurisdiction existed based upon 42 USC Sections 1983 and 1988, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution, and 28 USC Sections 1331, 1332

and 1343. Diversity jurisdiction being lacking, the serious basis for the retention of the action in the Federal Court system was premised upon 42 USC Section 1983. The District Court determined that jurisdiction against the Town and the Village could not, under the allegations of the complaint, be sustained upon that statute and dismissed the action as to the Town and the Village. That determination was sustained by the Second Circuit.

Factually, the Petitioner alleges in his complaint that on July 2, 1980 Fanning was acting in a "triple capacity". First, it is alleged, that he was acting as a private citizen, thus indicating that he had no relationship in this capacity with either the Village or the Town. Secondly, it is alleged that he was acting as an employee of the Village of Southampton, to wit, as a truck driver for the Department of Public Works. Thirdly, it is alleged that Fanning, at the time, was acting as a police officer for the Town of Southampton.

Acting in one of the above capacities, Fanning summoned the Village Police for assistance in the arrest of the Petitioner. At this point, Fanning arrested the Petitioner charging him with harassment, a violation of Section 240:25 of the New York State Penal Law and, also, with a traffic violation.

The Petitioner was handcuffed, the handcuffs allegedly causing pain, abrasions and contusions. He was taken to the Police Station and detained for a number of hours and released. These facts gave rise to the first cause of action alleged in the complaint, to wit, unconstitutional arrest or false imprisonment.

The complaint, although inartful, alleged in the second count damages because of negligence in the way the handcuffs were applied.

The third count sought damages for malicious prosecution.

Insofar as the Town and Village are concerned, the complaint is devoid of any allegation as to their fault other than the claim that defendants Chism and Fanning were employees of the municipal corporate defendants. Further, upon the motion to dismiss by the Village, Petitioner suggested no other theory, although otherwise expanding upon his complaint, as duly noted in the order of Judge Pratt dated February 4, 1982 (B1-B3).

The District Court dismissed the action as to the Town and the Village. Thereafter by stipulation pursuant to 28 USC Section 636 the parties stipulated to try the case before Magistrate Jordan. It was so tried with there being a jury verdict in favor of the defendant Chism and against the defendant Fanning and in favor of the Petitioner for the total sum of $500.00. An appeal was filed by the Petitioner. The appeal with respect to the defendants Fanning and Chism was, according to stipulation, to be taken to the District Court. The Petitioner has not perfected this appeal within the time limits provided by Rule 14 of the Rules Governing Magistrate's Proceedings in the Eastern District of New York and, presumptively, has abandoned that appeal.

The appeal from the orders dismissing the action as to the Town and Village was perfected to the Second Circuit, which Court affirmed the dismissal.

At this point, the Petitioner seeks to have this Court review the propriety of the dismissal of the action as against the Town and the Village.

POINT I

No basis for jurisdiction is alleged as against the Village.

The District Court afforded the Petitioner the opportunity to explain the nature of his causes of action incorporating that explanation as a part of his order and decision dated February 4, 1982 (B-2). At the same time the Court noted that the plaintiff did not allege any theory of liability against the Village other than on the basis of respondeat superior. Such allegations are not sufficient to impose liability or jurisdiction under 42 USC Section 1983. *Monell* v. *New York City Department of Social Services,* 436 U.S. 658 and *Owens* v. *Haas,* 601 F. 2d 1242, cert. den. 444 U.S. 980; and *Battista* v. *Rodriguez,* 702 F. 2d 393. The Courts below were, clearly, correct when they held that there was no jurisdiction under the Civil Rights allegations.

POINT II

The District Court, in the exercise of its discretion, properly declined to retain State law claims under the Doctrine of Pendent Jurisdiction.

Petitioner complained in his complaint regarding the actions of Fanning and Chism. With respect to Fanning, the complaint alleged that he was acting either in his individual capacity, in his capacity as a truck driver of the Village of Southampton or in his capacity as a part time police officer of the Town of Southampton. The jury awarded the Petitioner the sum of $500.00 for the alleged wrongful acts. Since that portion of the judgment stands, the potential liability of the Village, if Fanning's acts were done in the scope of his employment to the Village, would

be the sum of $500.00. With respect to Chism, who received a verdict, there is no liability and, hence, nothing that can effect the Village.

The District Court, in the exercise of discretion, declined to exercise pendent jurisdiction over the Village and such determination was not inappropriate. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 and *Moor* v. *County of Alameda,* 411 U.S. 693. Particularly, under the facts of this case, it was proper for the District Court, in the exercise of its discretion, to decline to exercise any pendent jurisdiction, presuming that such existed. *Nelson* v. *Meyer,* 520 F. 2d 1276, cert. den. 423 U.S. 1034. Clearly there is no independent Federal jurisdiction against the municipal defendants since diversity does not exist. Since the Civil Rights allegations are insufficient as a matter of law, it would not seem that pendent jurisdiction is available. *Aldinger* v. *Howard,* 427 U.S. 1.

CONCLUSION

This Court should not grant the writ.

Respectfully submitted,

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Dated: April 27, 1984

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NO. 83-1658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES F. McMANUS,

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—against—

THE VILLAGE OF SOUTHAMPTON, NEW YORK, and THE TOWN OF SOUTHAMPTON, NEW YORK, DONALD FANNING and JAMES CHISM,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Summary of Argument

Respondent Town of Southampton, New York respectfully submits that this Court should not issue a writ of certiorari to the United States Court of Appeals for the Second Circuit. It is this respondent's position that the Court of Appeals properly affirmed the judgment of the United States District Court for the Eastern District of

New York dismissing petitioner's complaint against the Town and Village of Southampton (the municipal respondents) for his failure to state a 42 U.S.C. §1983 claim against them cognizable under *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658 (1978). The *Monell* decision is dispositive of this matter, and petitioner fails to offer any compelling reason for modification of that decision under the circumstances presented in his case. Further, absent a basis for the exercise of Federal jurisdiction over their persons, the municipal respondents were properly dismissed as parties in this case. Therefore, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings, and its order does not call for an exercise of this Court's power of supervision.

ARGUMENT

POINT I

No claim was stated against respondent town

The order of the United States Court of Appeals for the Second Circuit correctly affirmed the District Court's dismissal of petitioner's false arrest complaint under the Civil Rights Act of 1871, 42 U.S.C. § 1983, against respondent municipality, the Town of Southampton, New York. The complaint gives no notice whatsoever of those elements necessary to state a cause against it under that statute, and, absent any other basis for the exercise of Federal jurisdiction over the municipal respondent, the trial court properly dismissed the complaint against it.

The complaint (Appendix E to Petition) contains a detailed factual statement in its first count alleging specific acts of the individual respondents, Donald Fanning and

James Chism, relating to a July 2, 1980 arrest, and a three-paragraph conclusion that summarily characterizes their acts as violations of § 1983 committed by them as individuals and as conspirators.

The second and third counts of the complaint are stated against the municipal respondents, the Town and Village of Southampton. They recite the failure and refusal of the municipal respondents to pay petitioner upon his filing notices of claim pursuant to N.Y. General Municipal Law § 50(e) (McKinney 1977), which requires such notice as a condition precedent to suit against municipalities. The second count alleges negligence in their refusal to honor his claim for certain physical and psychic injuries and out-of-pocket expenses. The third count alleges malicious prosecution in their refusal to honor his claim for malicious prosecution.

When afforded an opportunity to elucidate the pleading during argument of a dismissal motion by co-respondent Village of Southampton, petitioner represented that his complaint should be construed as setting forth causes of action for unconstitutional arrest, malicious prosecution and negligence in securing handcuffs. The trial court noted that petitioner advanced no theory of liability except the imputed liability of *respondeat superior* against the municipal respondents. The trial court therefore concluded that the complaint stated no cause of action under § 1983 against the municipal respondents. Appendix B to Petition, p. B-2.

In analyzing petitioner's compliance with Fed.R.Civ.P. 8(a)(2), the trial court correctly concluded that the pleading before it failed to give fair notice of any theory against which the municipal respondents would have to defend apart from *respondeat superior*. *Id.* Indeed, the petition before this Court at no point argues that the trial court erred in construing the fair import and intendment of

the complaint. In passing, the petitioner remarks that the dismissal mooted his requests for document production, but raises this point only in relation to his damages and not to any belated suggestion that such discovery was necessary to enable him to amend his complaint. Petition, p. 5.

The thrust of petitioner's argument, however, appears to be that he should not be required to plead negligent appointment or training of a municipal employee or officer in order to state a cause of action under § 1983. His argument, apparently addressed to the substantive requirements of pleading a § 1983 claim, is purely hypothetical because his complaint cannot be said to have put the municipal respondents on notice of this particular theory of liability. The complaint merely informs the municipal respondents that their liability is based on their status as employers, not on any acts or omissions of their own.

In addition to failing to meet the fair notice requirement of Rule 8(a)(2), the petitioner wholly fails to offer any persuasive reason to distinguish or modify the substantive pleading requirement governing § 1983 allegations against municipalities as set forth by this Court in *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658 (1978). In that decision, this Court stated unequivocally that

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent *official policy*, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694. (Emphasis supplied.)

Contrary to petitioner's argument, this rule has not been modified in subsequent cases. Petitioner cites only *Owen* v. *City of Independence, Missouri,* 445 U.S. 622 (1980), *reh. den.,* 446 U.S. 993 (1980), but the issue in *Owen* was governmental immunity, not the substantive § 1983 pleading requirement of official policy. Furthermore, in discussing the governmental immunity issue reserved in *Monell,* the majority opinion in *Owen* reiterated the above-quoted language from *Monell.* 445 U.S. at 658; *see, also,* 445 U.S. at 655, n. 39.

Petitioner's hypothesized liability theory of negligent hiring and training—posited at Petition, p. 5, but never raised below—fails to meet the *Monell* requirement. This negligence theory is subsumed under the status theory of *respondeat superior*: Employers may be held vicariously liable for the acts of employees not only because of their deep pocket but also because the imputing of liability to them may foster greater care in the selection and supervision of employees. *See* Prosser, Torts (4th ed.), § 4, p. 23; § 69, p. 459.

Accordingly, the complaint was properly dismissed for petitioner's failure to give fair notice that his injury resulted from any official policy of the municipal respondents.

POINT II

The lower courts, correctly citing controlling Supreme Court authority, declined to retain state law claims under the doctrine of pendent jurisdiction.

Petitioner also argues that the trial court abused its discretion in dismissing his pendent state law claim against the municipal respondents.

In the first place, as the Court of Appeals noted, Exhibit A to Petition, p. A-3, the lack of any basis for Fed-

eral jurisdiction over the persons of the municipal respondents mandated such dismissal. As this Court held in another § 1983 case, *Aldinger* v. *Howard,* 427 U.S. 1 (1976), there is no such thing as pendent party jurisdiction, only pendent claims jurisdiction.

In the second place, even were there a cognizable Federal claim stated against the municipal respondents in this non-diversity case, petitioner fails to offer a convincing argument why dismissal of the pendent state claim would be an abuse of the trial court's discretion. The trial court's allowing petitioner to proceed against individual respondent Donald Fanning in his dual capacity as an employee of both municipal respondents was irrelevant to the pendent jurisdiction issue: That ruling addressed the § 1983 requirement of showing color of state law in order to hold that individual respondent liable, not either of the municipal respondents.

Equally unpersuasive is petitioner's argument that he was deprived of a fair trial against the individual respondents because the absence of the municipal respondents "left the jury in the dark as to where indemnification might come from." Petition, p. 6. Petitioner would not deny the irrelevancy of the municipal respondents' financial resources to his right to damages. Therefore, he cannot be heard to complain that the trial court declined to hold them in as parties solely to permit speculation as to an unalleged duty on their part to indemnify the individual respondents.

Accordingly, the trial court did not abuse its discretion in dismissing the pendent state claim against the municipal respondents.

CONCLUSION

Inasmuch as the United States Court of Appeals' affirmance of the dismissal of the § 1983 complaint against the municipal respondent Town of Southampton was properly based upon recent decisions of this Court, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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